UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

LHF PRODUCTIONS, INC., Plaintiff, v. DOES 1-26, Defendants.	Case No.: 1:16—cv—09324 Honorable Virginia M. Kendall

MEMORANDUM IN SUPPORT OF
DEFENDANT'S 12(b)(6) MOTION TO DISMISS

Defendant DOE 26, by and through undersigned counsel, respectfully requests, pursuant to Federal Rule of Civil Procedure 12(b)(6), that this Honorable Court dismiss Plaintiff's Complaint in its entirety. In support thereof, Defendant states as follows:

FACTS

1. The Complaint alleges a single cause of action: Defendant allegedly violated the Copyright Act by copying and sharing Plaintiff's movie *London Has Fallen* using BitTorrent.

2. The Complaint alleges that a computer user participated for one second on a BitTorrent tracker that had some pieces of *London Has Fallen* available for download.

3. The Complaint alleges that the only information obtained about the computer user on the tracker was an Internet protocol ("IP") address.

4. The Complaint misrepresents the nature of IP addresses to suggest that an IP address identifies a particular computer user.

5. Each IP address can be associated with an indeterminate number of users—many of whom are unidentifiable.

6. The names sought in discovery by Plaintiff were not the computer users who committed the alleged infringement; the names sought, instead, were the names on the Internet subscriptions associated with the IP addresses.

7. The 26 people whose names were obtained by Plaintiff who are being forced to defend themselves against infringement claims are the administrators or payers of bills without any shown connection to the infringement alleged.

8. Participation on a BitTorrent tracker does not indicate that a copy has been made.

9. The specific facts alleged by Plaintiff regarding BitTorrent are not sufficient to show that copyright infringement was committed by anyone at all.

10. Plaintiff provided an incomplete explanation of BitTorrent swarms; when no seed is present, it is likely that infringement is an impossibility.

LEGAL STANDARD

Twombly **and** ***Iqbal*** **provide the standard of review for 12(b)(6) motions in general.**

The Supreme Court addressed the standard of review for 12(b)(6) motions and stated that allegations must be fact-specific where vagueness would require conclusions to be drawn. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In order to survive a 12(b)(6) motion, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 668 (citing *Twombly*, 550 U.S. at 570).

The Court in both *Twombly* and *Iqbal* heard plaintiffs allege circumstances in which the defendants could have acted unlawfully, but were unable to truthfully allege circumstances in which the defendants actually did act unlawfully. The instant case is much the same. Plaintiff alleges facts that, even if given the presumption of truth, can only prove that there is a possibility that Defendant has infringed. This fails to meet the standard of a facially plausible cause of action required by *Twombly* and *Iqbal*, for the reasons stated below.

***PTG Nevada, LLC v. Chan*,Case: 1:16-cv-01621[75] provides authority**

A court in this judicial district dismissed a copyright infringement claim against a defendant whose identification was solely by IP address. In that case, the order stated:

This Court agrees with those courts that have found that the plaintiff needs to allege more than just the registration of an IP address to an individual in order to proceed against that individual for copyright infringement.

PTG Nevada, LLC v. Chan,Case: 1:16-cv-01621[75] (2017).

ARGUMENT

The pleadings, accepted as true, must show that the infraction has occurred; that is how a complaint meets the standard of *Twombly* and *Iqbal*. The infraction in question is copyright infringement. To apply *Twombly* and *Iqbal* the first step is to identify the elements of copyright infringement. The second step is to compare the elements of copyright infringement to the specific facts alleged by Plaintiff. Copyright infringement has two elements: (1) that a copy was made and (2) that the defendant made it. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). *Twombly* and *Iqbal* hold that Plaintiff's allegations must satisfy both of the elements. If the allegations are true, was a copy made and did Defendant make it? If the answer to either of those questions can be negative, then the standard has not been met.

ALLEGATIONS FAIL TO CONNECT DEFENDANT TO INFRINGEMENT

Courts have already concluded that the person paying an Internet bill may not be the purported infringer. See *VPR Internationale v. Does* 1-1,017, No. 11-02068 (ECF Doc. 15 at 2), 2011 WL 8179128 (C.D. Ill. Apr. 29, 2011) ("Where an IP address might actually identify an individual subscriber and address, the correlation is still far from perfect . . . [t]he infringer might be the subscriber, someone in the subscriber's household, a visitor with her laptop, a neighbor, or someone parked on the street at any given moment."). Other courts in this Circuit have also discussed this issue and reached the same conclusion. See, e.g., *Malibu Media, LLC v. Reynolds*, Case No. 12-cv-6672 (ECF Doc. 51 at 13) (N.D. Ill Mar. 7, 2013); *TCYK, LLC v. Doe*, 2013 U.S. Dist. LEXIS 88402, 6 (N.D. Ill. June 24, 2013) ("the increasing ubiquity of wireless networks undermines the copyright holder's assumption that the ISP subscriber is the copyright infringer"). Courts further afield have found the same. See *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y. 2012) ("It is no more likely that the subscriber to an IP address carried out . . . the purported illegal downloading . . . than to say an individual who pays the telephone bill made a specific telephone call."). And courts in this district have begun to foreclose the possibility of the discovery fishing expeditions that Plaintiff plans, finding that it is not a "reasonable calculation that the individuals connected to the subpoenaed IP addresses will have any discoverable information related to the current defendants." *Pacific Century Int'l, v. Does 1-37*, 282 F.R.D. 189, 195 (N.D. Ill. Mar. 30, 2012). Courts are growing wise to what this sort of litigation actually is: Plaintiff, in essence, is suing a location.

In a case earlier this year with an identical fact pattern, a court in the Eastern Division of the U.S. District Court for the Northern District of Illinois held that a subscriber to a Comcast account was not sufficiently linked to the conduct of the computer-user where the only identifying information was the IP address. That case was dismissed for failure to state a claim.

Plaintiff has failed in the Complaint to connect Defendant to the alleged infringement with anything other than the IP address. In so doing, Plaintiff has not satisfied the element of copyright infringement that requires the defendant to have made a copy. Plaintiff's conclusory statement that Defendant made a copy is not enough, because Plaintiff has not based the conclusion on any fact other than the IP address. Defendant is at an unfair disadvantage regarding some of the facts. Contact with co-defendants in this case would allow for the co-defendants to benefit from knowing what Plaintiff is doing. It would be interesting to learn whether anyone has committed copyright infringement at all, and whether any of the defendants has ever used BitTorrent.

If the allegations of Plaintiff are true, was a copy made?

Accepting the facts as alleged by Plaintiff, it is likely that no copy was made. Plaintiff alleges that Defendant participated in a file-sharing swarm that attempted to share a copy of Plaintiff's movie. Swarms without a seed are likely not to have a full copy. If there is no full copy spread among the peers, no one can make a complete copy.

Before a file is complete, the torrent file is only an “encrypted, unusable chunk of zeroes and ones,” and not a copy at all within the legal definition. *Ingenuity 13, LLC v. Doe*, 2013 U.S. Dist. LEXIS 16952, *7 (N.D. Cal. Feb. 7, 2013). Plaintiff only shows an instant of appearing on the tracker. The tracker itself is not the location of a download. Instead, it is where peers go to find each other.

The data as shown on the spreadsheet does not show infringement. As a court in the Ninth Circuit explains, referring to a spreadsheet like the one Plaintiff has filed as Exhibit B of its Complaint: "[t]his snapshot allegedly shows that the Defendants were downloading the copyrighted work—at least at that moment in time. But downloading a large file like a video takes time . . . . [i]n fact, it may take so long that the user may have terminated the download. The user may have also terminated the download for other reasons. To allege copyright infringement based on an IP snapshot is akin to alleging theft based on a single surveillance camera shot: a photo of a child reaching for candy from a display does not automatically mean he stole it. No Court would allow a lawsuit to be filed based on that amount of evidence." *Ingenuity 13, LLC v. Doe*, 2013 U.S. Dist. LEXIS 16952, *7 (N.D. Cal. Feb. 7, 2013).

JOINING A SWARM IS NOT COPYRIGHT INFRINGEMENT

For copyright infringement to occur, a copy must be made, one that is substantially similar to the original and able to be viewed by an audience. *Feist*, 499 U.S. at 361. None of the details provided in the Complaint indicate that a complete copy was made by the swarm. Although it is possible that a copy was made, the allegations when accepted as true do not suggest that copyright infringement did occur. The facts alleged do not truthfully allege circumstances where copyright infringement has taken place.

The technology of BitTorrent does not permit viewing at all if a single piece is missing. The particular facts alleged by Plaintiff are missing necessary details without which no viewing can occur. This means that even when Plaintiff's allegations are accepted as true, they fail to show that the infraction must have occurred.

PLAINTIFF HAS FAILED TO ALLEGE THAT A COPY WAS MADE.

Plaintiff alleged that Defendant reproduced and shared Plaintiff's movie, but the specific allegations do not support that conclusory allegation. Plaintiff's factual allegations rely upon Exhibit B of its Complaint, which is a table put together by a European agent of Plaintiff. One of the columns on the table shows the date and time. The table has a column of IP addresses that appeared on the tracker for one second, "2016-06-05 23:34:59" meaning June 5, 2016, at 11:34.59 pm. By 11:35 pm the IP address in question was not shown to be participating, and at 11:34.58 pm the IP address in question was not shown to be participating. Participation for one second on a BitTorrent tracker is not an allegation of file-sharing. It is not enough time to download a complete movie or upload a complete movie.

The column of Exhibit B that has the movie title does not imply that the whole movie was copied. That is the name of the files that have pieces of the movie. Thousands of peers can be in a swarm without any of them having the one piece that all of the peers need. The movie is not viewable without each piece. The data shown in Exhibit B does not provide sufficient information or the type of data that would indicate whether a complete copy was available or possible.

Some of the information on the table of Plaintiff's Exhibit B had no relationship to the BitTorrent tracker data. The last four columns (the Internet service provider's name, the state, the town and the county) do not represent data captured of the computer user that participated on the BitTorrent tracker. That information describes the location of the account subscription, but the existence of the subscription is not determinative of the identity of the computer user on June 5, 2016, whose activity was associated with this IP address. Instead, it was from a geolocation search of the IP address standing alone and unrelated to the BitTorrent activity.

CONCLUSION

Plaintiff has alleged that a user identified by the IP address 71.194.42.60 appeared on a BitTorrent tracker for a second. Even if that IP address was on the BitTorrent tracker, that would not mean that a copy of a movie was made. It would not mean that the IP address had shared the movie. There is not enough specificity in the allegations regarding the capability of the swarm to make a copy. Plaintiff offered plenty of detail but not the details that indicate infringement. Instead, Plaintiff has simply shown enough information to get the names and addresses that were sought. Those names and addresses should be available to all of the co-defendants so that we are not at an unfair disadvantage regarding information. In the meantime, the element of copyright infringement that a copy be made has not been sufficiently alleged. The repeated conclusory statements about copies and infringement are not supported by any specific allegation.

Plaintiff has not sufficiently alleged that Defendant made a copy or even participated. There is no allegation that Defendant has ever used the Internet. The only allegation regarding Defendant, individually and personally, is that Defendant was the subscriber for the household at the time of the alleged infringement.

For the foregoing reasons, Defendant respectfully requests that this Court dismiss Plaintiffs' Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

/s/Susan Malter

Susan Malter #6207793
Chicago Volunteer Legal Services (#91139)
33 N. Dearborn, Suite 400
Chicago, Illinois 60602
(224) 552-0452
Attorney for Defendant Doe 26